HO SOON GUAN

v.

KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-14-3-99]
21 SEPTEMBER 2001

CIVIL PROCEDURE: *Appeal - Fact, findings of by Special Commissioners -Situations in which allowed*

The appellant (taxpayer) who was 53 years old applied to participate in a scheme (the separation scheme) offered by his employer, the Hong Kong Bank Malaysia Berhad (the bank). When the appellant chose to retire under the Separation Scheme he was paid RM390,437 as compensation for loss of employment. The respondent calculated a tax of RM113,021.60 based on the compensation received. The appellant protested on the ground that the compensation was made on account of his ill-health and that therefore he was entitle to exemption under para. 15(1)(a) of sch. 6 of the Income Tax Act. The Special Commissioners for Income Tax had to decide whether the compensation received by the appellant fell within the exemption under para. 15(1)(a) or (b) of sch. 6 to the Income Tax Act.

After considering the evidence and facts the SC concluded that the appellant had lost his employment because he participated in the separation scheme and not because of any other reasons. The appellant was therefore not entitled to the exemption.

The appellant appealed on the basis that the SC had not considered the evidence and that it was wrong in the determination of the facts and the inferences therefrom.

The issue for consideration therefore was whether an appellate court could question the decision of the SC.

Held:

[1] The SC is allowed to make the following findings, namely (a) findings of primary facts; and (b) inferences drawn from such primary facts. (p 194 h-i)

[1a] Though it is a pure finding of fact, the SC's decision may be set aside if it appears that it had acted without any evidence or upon a view of the fact which could not reasonably be entertained. (p 196 a)

[1b] When a case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad in law and which bears upon the determination, it is obviously erroneous in point of law. (p 196 c-e)

[2] The SC relied on findings of primary facts which were admitted by the parties and the SC also considered as proved to their satisfaction certain other primary facts. (p 197 c)

[2a] The SC had found as established primary facts which showed that the taxpayer had participated in the separation scheme voluntarily and had opted to retire early and indeed had applied under the scheme to retire early and that he had not retired because of ill-health. The SC had also observed that the appellant had decided to apply for retirement when the bank introduced the separation scheme and even then no mention was made as regards his illness in the application nor in the approval. There was therefore nothing in the decision of the SC as being *ex facie* bad in law. (p 197 d)

[Appeal dismissed with costs.]

Case(s) referred to:
Chua Lip Kong v. DGIR [1982] 1 MLJ 235 ***(foll)***
Edwards HM Inspectors of Taxes v. Bairstow & Harrison 36 TC 207 ***(foll)***
Lower Perak Co-operaitve Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 ***(foll)***

Legislation referred to:
Income Tax Act 1967 ss. 4, 13, 127, sch 5, 6, para 15(1)(a), (b)

For the appellant - Kenneth Gomes; M/s Sabarudin Othman & Ho
For the respondent - Abu Tariq Jamaluddin, Legal Officer (Inland Revenue Board)

Reported by Mariette Peters-Goh

JUDGMENT

KC Vohrah J:
The appellant (the taxpayer) in this case is appealing against the decision of the Special Commissioners of Income Tax (the SC) and the appeal has come to this court by way of a case stated pursuant to sch. 5 to the Income Tax Act 1967 (the Act).

On 14 February 1997 the taxpayer who was 53 years old applied to participate in a scheme offered by his employer, the Hongkong Bank Malaysia Berhad (the bank). The scheme was open to all resident officers who were 47 years

of age or more on 1 July 1997. The circular introducing the scheme called it a "separation scheme" (the separate scheme) and invited applications for the period 15 January 1997 to 15 February 1997, with the bank receiving the right to accept or reject any application to participate in the separation scheme without assigning any reason whatsoever.

The separation scheme provided for early retirement and contained a formula for calculating the benefits available under the scheme.

The separation scheme has to be viewed in the context of certain agreed facts relating to the bank's business strategy in regard to its officers. Every five years, the bank had a five year operating plan. The five year plan from 1997 to 2001 was called the "Malaysia Strategic Plan". The bank embarked on a new business strategy which was supposed to have an impact on the culture and work ethics of the bank and the way the bank did its business. In order for the new business strategy to thrive, the bank needed a new organisational structure and the bank introduced the separation scheme for resident officers under Circular Memorandum 97/20007 dated 8 January 1997. Three categories of staff were targeted, those not suitable in the news structure, those not performing and those who were suffering from illness. There was no board decision as to these three target categories but oral directives from the manager of the bank to the personnel department were reviewed.

At the time the taxpayer applied to join the scheme he had taken a special post one lower than then that he had occupied before, as he was afflicted with polymyositis which necessitated him having to wear a neck collar.

On 25 February 1997 the bank in a letter to the bank accepted the taxpayer's participation in the separation scheme and stated that he would be advised of the last day of service under the scheme.

On 18 July 1997 the taxpayer left the service of the bank under the separate scheme which was about one year before his actual age of retirement.

The bank requires a report from a medical board in order to terminate a person on medical grounds. In the taxpayer's case a medical board was not constituted.

With his leaving the service of the bank under the separate scheme the compensation that the taxpayer received was calculated on a different basis from what he would have received had he retired outside the separation scheme.

When he chose to retire under the separation scheme he was paid RM390,437 as "compensation for loss of employment" under the separation scheme for the Year of Assessment of 1997. The respondent (revenue) calculated a tax of RM113,021.60 based on the compensation received. Despite numerous requests from the appellant for total exemption from tax on the ground that the compensation was made on account of his ill-health and that he is entitled to such exemption under para. 15(1)(a) of sch. 6 to the Act, revenue refused to give such exemption. Revenue instead awarded a reduction of RM4,000 per annum on the number of years completed acting under para. 15(1)(b) of sch. 6 to the Act.

The SC had to decide whether the compensation received by the taxpayer falls within the exemption under para. 15(1)(a) or para. 15(1)(b) of sch. 6 to the Act.

It would be necessary to set out the provisions of the Act as are relevant in this case. First, we need to go to the relevant class of income on which tax is chargeable (s. 4), then to what is included as gross income of an employee in respect of gains or profits from an employment (s. 13), followed by the income that is generally exempt from tax (s. 127) and finally specified types of income which are exempt from tax either fully or partially (para. 15 of sch. 6 to the Act).

Section 4 reads:

> 4. **Classes of income on which tax is chargeable.**
>
> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> (a) ...
>
> (b) gains or profits from an employment;
>
> (c) ...
>
> (e) ...
>
> (f) ...

Section 13 reads:

> 13. **General provisions as to employment income.**
>
> (1) Gross income of an employee in respect of gains or profits from an employment includes:
>
> (a) ...

(e) any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment, including any amount in respect of:

(i) ...

(ii) ...

Section 127 reads:

127. **Exemption from tax: general**

(1) Notwithstanding any other provision of this Act, any income specified in Part 1 of Schedule 6 shall, subject to this section, be exempt from tax.

(2) ...

Paragraph 15 of sch. 6 to the Act reads:

SCHEDULE 6

(SECTION 127)

EXEMPTIONS FROM TAX

PART 1

INCOME WHICH IS EXEMPT

(1) ...

...

15. (1) A payment (other than a payment by a controlled company to a director of the company who is not a whole-time service director) made by an employer to an employee of his as compensation for loss of employment or in consideration of any covenant entered into by the employee restricting his right to take up other employment of the same or a similar kind:

(a) if the Director General is satisfied that the payment is made on account of loss of employment due to ill-health; or

(b) in the case of a payment made in connection with a period of employment with the same employer or with companies in the same group, in respect of so much of the payments as does not exceed an amount ascertained by multiplying the sum of four thousand ringgit by the number of completed years of service with that employer or those companies

(2) ...

The SC in dealing with the issue whether the compensation received by the taxpayer falls within the exemption under para. 15(1)(a) or para. 15(1)(b) of sch. 6 to the Act correctly stated that what that they had to decide was

"whether the compensation received was for loss of employment due to ill-health or not" and that the decision would be on a question of fact.

The SC quite clearly sifted through the evidence which included documentary evidence and found the following:

1. The Circular Memorandum issued by the employer, the Bank, does not spell out who were eligible to apply under the Separation Scheme except paragraph 1 (page 2 of Exhibit C) which reads:

   > This Scheme is open to all Resident Officers who are 47 years of age or more as at 1 January 1997.

2. The 3 categories of officer, who were targeted as stated by AW1 were not mentioned in the Circular Memorandum.

3. In an application to opt under the Separation Scheme, an officer need not state the reasons nor does the employer need to give reason for acceptance, if and when it does.

4. In the application form for retirement under the Separation Scheme which is a standard format, there was no necessity or requirement to state any reason.

5. The Appellant was 53 years old and qualified under the Separation Scheme.

6. The Appellant opted for early retirement under the Resident Officers Separation Scheme and his application was dated 14 February 1997 (page 4 of Exhibit C).

7. The employer had received two letters dated 24 April 1996 and 24 January 1997 from the appellant's doctors indicating some form of illness of the appellant but they did not state that the appellant was unfit for work or that his ill-health warranted termination or retirement either voluntarily or otherwise.

8. The approval for the appellant to retire under the separation scheme was given on 25 February 1997.

9. Subsequent to the approval on 25 February 1997 under the separation scheme, the appellant produced two other letters dated 12 April 1997 and 2 December 1997 (p. 10 and 11 of exh. C) from one Dr Goh Khean Jin of University Malaya. The letters stated '... strongly support his request for early retirement due to his condition.' And 'It is unlikely that he would be able to gainfully engage in any work unless his condition improves significantly.

After having enumerated the nine paragraphs above the SC observed that from the facts it was clear to them that the taxpayer had opted (to retire) under the separation scheme and concluded:

He, therefore lost his employment because he participated in the Separation Scheme and not because of any other reasons.

The SC ruled after considering some other aspects of the evidence (to which I shall come later) that the taxpayer was not entitled to exemption under para. 15(1)(a) but under para. 15(1)(b).

The taxpayer argues that the main conclusion of the SC that the taxpayer lost his employment under the separation scheme and not on account of ill-health "does not warrant the conclusion that the loss of employment was made because of his participation in the scheme." The taxpayer, submitted, **firstly,** there is a difference in participating in the scheme and stating that the loss of employment "was due to the separation by and itself." His participation in the scheme was not an issue and that the SC had not considered the real issue whether there was sufficient evidence for the SC to be satisfied that compensation was made on account of loss of employment due to ill-health and that the SC was wrong in the determination of the facts and the inferences therefrom.

The **second** point of submission, which overlaps the first point, is that there was sufficient evidence adduced before the SC to support the contention that the taxpayer was considered for participation in the separation scheme because of his ill-health ie, that the taxpayer was ill even before the separation scheme was brought up, that the medical reports showed that he was suffering from polymyositis, a muscular disorder, and that the taxpayer would need "long periods of rest" and that "he would be unlikely to be gainfully engaged in any work unless his condition improves significantly."

It will be noted that the taxpayer in attacking the decision is touching fundamentally on findings of fact which the SC made.

When can an appellate court question the decision of the special commissioners?

In *Chua Lip Kong v. DGIR* [1982] 1 MLJ 235 at 236 Lord Diplock in delivering the decision of the board sets out the nature of the findings of the special commissioners which can be challenged on appeal. In this context the following are the different kinds of findings that can be made by the special commissioners, namely:

(a) findings of primary facts which are usually admitted by the parties or proved by either of them to the satisfaction of the special commissioners; and

(b) inferences drawn from such primary facts and there are two such types of inferences, namely:

(i) inferences of fact; or

(ii) inferences of mixed fact and law.

This what Lord Diplock observed:

> Their Lordships cannot stress to strongly how important it is tat, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself, occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings. It is primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".
>
> From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioner's finding of a primary fact; but may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law. It is therefore desirable that in a Case Stated the Special Commissioners should set out in a separate paragraph from that which contains their findings of primary facts such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences: *viz* – whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.
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> In a Case Stated summaries of the rival contentions of the parties should follow the Commissioners' statement of primary facts admitted or proved and of any inferences that the Commissioners have drawn therefrom in arriving at their decision. The summaries would be restricted to the parties' contentions of law; they should not include, as paras. 9 and 10 do in the instant case, arguments of the parties directed solely to the reliability of the evidence heard by the Commissioners an inferences of pure fact that ought to be drawn from it. These are not arguments that are for consideration by the court; they deal with matters that are for decision by the Commissioners alone.

In 1955 Viscount Simonds in the House of Lords's case of *Edwards HM Inspector of Taxes v. Bairstow & Harrison* 36 TC 207 held (at 224):

> ... For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the Court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.

Lord Radcliffe formulated the following "*locus classicus*" (at p. 229) after discussing some English and Scottish cases on the matter:

> ... If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a Case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. *When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is obviously, erroneous in point of law. But without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too there has been error in point of law.* I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.
>
> (emphasis added)

Our Supreme Court decision of *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540 has re-affirmed these principles.

The SC relied on findings of primary facts which were admitted by the parties and the SC also considered as proved to their satisfaction certain other primary facts. The taxpayer has mentioned that the SC did not take into account certain aspects of the evidence of AW1, Encik Abdul Jalik bin Mohd, the human resource manager which he considered crucial but these aspects have not been

included in the case stated (which he should have requested to be included) and I do not propose to consider them although I must state that even if they were included they are not relevant.

1 do not see anything in the decision as being *ex facie* bad in law. Nor do I see that the facts found and the inferences made from such facts and the application of the relevant law to them are such that "no person acting judicially and properly instructed as to the relevant law could have come to the determination under the appeal."

The SC had found as established primary facts which showed that the taxpayer had participated in the separation scheme voluntarily and had opted to retire early and indeed had applied under the scheme to retire early and that he had not retired because of ill-health. It is not as though the SC was not aware that at the time he applied to join the separation scheme the taxpayer was suffering some form of illness. The SC noted that it had to be stressed that although the taxpayer had had the medical problem since 1995, he had not applied for retirement on the ground of ill-health at all nor was the approval to retire based on ill-health. The SC also observed that the taxpayer had decided to apply for retirement when the bank introduced the separation scheme and even then no mention was made as regards his illness in the application nor in the approval.

The SC referred to the approval letter from the bank dated 25 February 1997 to appellant which reads:

> I refer to your letter of 14 February 1997 and confirm that **your application to participate in the Separation Scheme has been accepted**. (emphasis added)

And the SC took into account the words emphasised and related this letter to a letter which the bank sent to revenue which reads:

> We wish to confirm that the Bank is paying him a 'Compensation for loss of employment' of RM390,437.00 upon his leaving the Bank's service under the Separation Scheme on 18 July 1997, taking into consideration that he has served the Bank for over 36 years and has another 1 year of service before his actual retirement in 1998.

It was argued by the taxpayer that there were sufficient medical reports which showed that the taxpayer suffered from a disability disease. The SC had accepted as proved that the taxpayer suffered from polymyositis, an inflammatory disease affecting his neck muscles which necessitated him wearing a neck collar and that the bank had felt that his wearing the neck collar was unsuitable for him in his position as senior credit manager where he needed to meet financial controllers of large corporations and to attend company's function and that the bank had created a special position for him in the personnel department as manager, planning and social projects which

was a position lower than the taxpayer's earlier position. The SC relied on the letters from the taxpayer's doctors for their findings but the SC made a finding that these two letters did not state that the taxpayer was unfit for work or that his ill-health warranted termination or retirement either voluntarily or otherwise and the SC found as a fact that the taxpayer had "lost his employment because he participated in the separation scheme and not because of any other reason" after also noting that after the approval for the taxpayer came from the bank to retire under the separation scheme on 25 February 1997 then only did the taxpayer produce two letters from a doctor from University Malaya one dated 12 April 1997 giving strong support to his request for early retirement (he retired under the separation scheme on 16 July 1997) and the other dated 2 December 1997 which noted that it "is unlikely that he would be able to gainfully engage in any work unless his condition improves significantly."

The SC also commented on a letter from the bank dated 18 June 1997 to the taxpayer which seemed to show that the bank had approved his joining the scheme on health grounds:

> I confirm that your application under the above scheme with effect from 18 July 1997 was approved based on health grounds as evidenced by medical report from Dr Goh Khean Jin, Department of Medicine, University Hospital dated 24 April 1996 and 24 January 1997.

The SC rejected the letter again observing that after the approval for retirement under the separation scheme had been made the taxpayer had attempted something "which is definitely an after-thought in order to obtain full exemption under the Act".

The finding which the SC made is that while the taxpayer did suffer from ill-health which arose from a disability as shows from the letters and reports from doctors the taxpayer had retired and received compensation under the separation scheme and had not retired on account of ill-health. The SC were finders of facts. They were judges on the reliability of evidence. The SC were perfectly entitled to make the inference that the taxpayer had lost his employment by way of retirement under the vehicle of the separation scheme and not on account of ill-health. I cannot see it as a perverse decision. I can see no error of law in this finding nor in the finding that revenue "is perfectly right in **not** being "satisfied that the payment is made on account of loss of employment due to ill-health" (under para. 15(1)(a) of sch. 6 of the Act)."

I can see no reason for interfering with the decision of the SC. The appeal is dismissed with costs.